IN THE COURT OF APPEALS OF IOWA

No. 9-791 / 08-1616
Filed January 22, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK ANTHONY EVANS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

A defendant appeals his judgment and sentence for second-degree burglary, contending that counsel was ineffective in (1) failing to properly object to prior identification testimony and (2) failing to challenge the verdict as not unanimous; he also raises several pro se claims. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Thomas J. Gaul, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Michael T. Hunter and Olubunmi Salami, Assistant County Attorneys, for appellee.

Considered by Vaitheswaran, P.J., and Danilson, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VAITHESWARAN, P.J.

Mark Evans appeals his judgment and sentence for second-degree robbery. He contends his trial attorney was ineffective in (1) failing to properly object to prior identification testimony and (2) failing to challenge the verdict as not unanimous. He also raises several pro se claims.

I. Background Facts and Proceedings

Pam Riley was working at a Des Moines Subway restaurant when a man entered the store and demanded money. The man took Riley's purse, along with money and other items, placed them in a trash bag that came from the store, and ran out. Riley called the police.

A witness was driving to work when she saw a distraught woman in the parking lot of the Subway restaurant and a young man with a bag running "like a bat out of heck." According to the witness, the young man got into a car that was a "weird green" color. The witness followed the green car for enough time to memorize the license plate number. She then flagged down a police officer and gave him the number. Officers chased the car until it crashed. They found Mark Evans inside, together with a trash bag containing Riley's purse and cash. Evans was apprehended.

Another witness, Shawn Arnett, was also at the scene. He saw an individual fleeing the restaurant and chased the person on foot. When police arrived, they took Arnett to the location where Evans was apprehended. Arnett identified Evans as the individual he had chased.

The State charged Evans with first-degree robbery.[1] Arnett, who had escaped from a correctional facility, was unavailable to testify at the time of trial. Accordingly, the defense sought to admit his deposition in which he denied that Evans was the man he chased. The State did not object to the admission of the deposition but stated that, if it was admitted, the State should be allowed to offer Arnett's earlier identification of Evans as the person he chased. The district court ruled that the State could introduce Arnett's prior identification. At trial, a Des Moines detective testified that Arnett identified Evans "without hesitation" as the person he had pursued.

After the case was submitted to the jury, the jury sent the judge a written question. Before the parties could be assembled to discuss the question, the jury informed the court that it had reached a verdict. The question was not included in the record. The jury found Evans guilty of the lesser included offense of second-degree robbery.

As allowed by rule, the defense asked the court to question each juror as to whether this was indeed his or her verdict. One of the jurors engaged in the following discussion with the court:

> THE COURT: [I]s that your verdict?
> JUROR []: Well, yeah, I guess. It's got to be unanimous; right?
> THE COURT: That's why I'm asking the question. I want to make sure this is a unanimous verdict. Is that your verdict?
> JUROR []: Yeah.

The court accepted the verdict. The district court subsequently denied Evans's new trial motion and imposed sentence. This appeal followed.

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[1] A second charge of robbery based on a separate incident was severed for trial.

II. Ineffective Assistance

To prevail on his ineffective assistance of counsel claims, Evans must show that counsel breached an essential duty and prejudice resulted. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Our review of these claims is de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005).

A. Identification Testimony

Evans claims that his trial attorney was ineffective in failing to object to the detective's testimony concerning Arnett's prior on-site identification. While he acknowledges that defense counsel made a hearsay objection which was overruled by the court, he maintains counsel also should have objected to the statement on Confrontation Clause grounds. U.S. Const. amend. VI (guaranteeing that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him").

The State concedes that the rule on which the district court relied to admit the detective's testimony is inapplicable. *See* Iowa R. Evid. 5.801(*d*)(1)(C) (holding prior statements of "identification of a person made after perceiving the person" are not hearsay but requiring declarant to testify at trial and be "subject to cross-examination concerning the statement"). The State also concedes that a Confrontation Clause objection would have been appropriate. *See State v. Schaer*, 757 N.W.2d 630, 635 (Iowa 2008) ("If a hearsay statement made by a declarant who does not appear at trial is testimonial, evidence of that statement is not admissible under the Confrontation Clause unless the declarant is unavailable to testify at trial and the defendant had a prior opportunity for cross-

examination."). The State argues, however, that (1) the erroneous admission of the detective's hearsay statements was harmless error and (2) Evans cannot show *Strickland* prejudice. We find it unnecessary to address the State's harmless error argument because Evans is not challenging the district court's ruling on defense counsel's hearsay objection but is instead challenging counsel's failure to also raise a Confrontation Clause objection. This omission must be analyzed under the *Strickland* prejudice standard.

That standard requires Evans to establish a reasonable probability that, without counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. As noted, Evans was apprehended in a green car that a witness saw him enter near the Subway restaurant. He was found with Riley's purse and a stack of cash in a plastic trash bag in his possession. Based on this evidence, we conclude there is no reasonable probability that, had defense counsel raised a Confrontation Clause objection, the result would have been different.

B. Unanimous Verdict

Evans next claims his trial attorney was ineffective in failing to ensure a clear and unanimous verdict. He points to the single juror's "yeah, I guess" response. Evans also couches his argument in terms of trial court error but failed to raise an objection with the court. Therefore, we will only examine this issue under an ineffective-assistance-of-counsel rubric.

The jury must unanimously agree on a verdict in a criminal case. Iowa R. Crim. P. 2.22(5). To that end, a party may ask each juror if he or she is in agreement with the verdict. *Id.* "If any juror expresses disagreement on such

poll or inquiry, the jury shall be sent out for further deliberation; otherwise, the verdict is complete and the jury shall be discharged." *Id.*

We agree with Evans that the juror's "yeah, I guess" response might be viewed as equivocal. However, there was no equivocation in that juror's follow-up response. Therefore, we conclude counsel was not ineffective in failing to seek further deliberations.

III. Other Claims

Evans raises several additional claims in his pro se brief: (1) a challenge to the district court's ruling on his new trial motion based on the weight of the evidence; (2) a challenge based on his absence at the time the jury's question was to be considered; and (3) a challenge to the unanimity of the verdict. The third argument has been addressed above. Therefore, we will focus on the first two.

A. New Trial Motion

Evans takes issue with the district court's ruling on that portion of his new trial motion claiming the verdict was contrary to the law and evidence. In his brief, he simply maintains the verdict was "contrary to the weight of the evidence." *See State v. Ellis*, 578 N.W.2d 655, 658 (Iowa 1998) (stating the "weight of the evidence" refers to "a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other" (quoting *Tibbs v. Florida*, 457 U.S. 31, 37–38, 102 S. Ct. 2211, 2216, 72 L. Ed. 2d 652, 658 (1982))). Because he does not explain how it was contrary to the weight of the evidence, we conclude the argument is too vague to address. *See State v. Piper*, 663 N.W.2d 894, 913–14 (Iowa 2003) ("In addition, the

defendant has merely presented these claims on appeal in one-sentence conclusions without analysis . . . . We conclude Piper has waived any argument with respect to these issues as any consideration of the merits of the defendant's complaints by this court of appeal would require the court 'to assume a partisan role and undertake [defendant's] research and advocacy,' a task we will not accept." (quoting *State v. Stoen*, 596 N.W.2d 504, 507 (Iowa 1999)).

B. Jury's Question

Evans argues that his attorney failed to object to the omission of the jury's question from the record. He also appears to contend that the jury should have received an answer in his presence.

With respect to the jury's question, that question became irrelevant when the jury reached a verdict a few minutes after posing it and before the court could convene the parties and respond to it. Therefore, counsel's failure to object to its omission from the record was not prejudicial in the *Strickland* sense.

As for Evans's absence from the courtroom, we note that there was no communication between the court and the jury outside Evans's presence. *See* Iowa R. Crim. P. 2.19(5)(*g*) (requiring defendant's presence when the jury receives additional instructions from the court). *Cf. State v. Lockheart*, 410 N.W.2d 688, 697 (Iowa Ct. App. 1987) (finding any error resulting from a judge's response to a jury's question without conferring with the defendant that the jury should re-read the instructions was harmless because there was no evidence that the communication had any bearing on the law or the evidence and because there was no indication that the communication would have been different had the defendant been present). Therefore, there was no *Strickland* prejudice.

We find any remaining arguments too vague to address. *See Piper*, 663 N.W.2d at 913-14. Additionally, we decline to address two issues raised for the first time in Evans's reply brief. *See Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992) (stating "an issue cannot be asserted for the first time in a reply brief").

We affirm Evans's judgment and sentence for second-degree robbery.

AFFIRMED.